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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 865

HUGH McINTOSH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Hugh McIntosh, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction in the United States District Court for the Eastern District of New York on a charge of robbery of merchandise moving in interstate commerce in violation of 18 U.S.C. § 1951 and of conspiracy to commit such a robbery.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed as Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1970. A timely petition for rehearing was denied, without opinion, on May 8, 1970. By an order dated May 27, 1970, Mr. Justice Harlan extended the time for filing this petition to and including July 7, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the government engaged in misconduct which deprived petitioner of a fair trial before an impartial jury, as guaranteed by the Sixth Amendment, by announcing the calling of its star witness, the widely notorious Joseph Valachi, in a manner calculated to produce highly prejudicial and inflammatory publicity.

2. Whether the publicity which surrounded the appearance of Valachi, read by all of the jurors, was so inherently prejudicial that petitioner was denied his Sixth Amendment right to a trial before an impartial jury.

3. Whether testimony by government witness Valachi concerning conversations with two of petitioner's co-defendants, in which they linked petitioner with the crime charged, deprived the petitioner of his Sixth Amendment right to confront the witnesses against him.

4. Whether limitations placed upon the cross-examination of a government witness who gave testimony essential to the government's case deprived petitioner of his Sixth Amendment right to confront the witnesses against him.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner and three co-defendants, Persico, Albanese and Spero, have been tried five times on a 1960 indictment charging them with hijacking and conspiring to hijack a truck loaded with merchandise moving in interstate commerce from the Akers Motor Lines Terminal in Brooklyn, New York, on or about July 28, 1959.[1] The first trial, in May, 1961, ended in a jury disagreement. The second trial, in June, 1961, resulted in the conviction of petitioner and the three co-defendants on both counts, but the convictions were reversed on appeal. *United States* v. *Persico*, 305 F.2d 534 (2d Cir. 1962). The third trial, in the spring of 1963, ended with a mistrial as to Persico, Albanese and Spero[2] and a jury disagreement as to petitioner. The fourth trial ended in April, 1964, with the conviction of petitioner and the three co-defendants on both counts, but the convictions were again reversed on appeal. *United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965).

[1] The indictment also named as defendants Joseph Magnasco, who was shot and killed after the second trial but before sentencing, and George LaFante, who was acquitted at the fifth trial.

[2] The mistrial was declared because Persico was shot and wounded on a Brooklyn street while the trial was in progress.

In the fifth trial, April-May, 1968, the jury convicted petitioner and the three co-defendants on both counts. On October 11, 1968, following the submission of post-trial motions, the trial judge distributed to all parties a memorandum and order he intended to file, dismissing the indictment.[3] In the memorandum, the trial judge rejected each of the specific claims for relief made in the post-trial motions. However, in evaluating the totality of the circumstances surrounding the repeated efforts of the government to obtain a conviction, the trial judge concluded:

> "that the history of the present case through the date of verdict in the fifth trial, *including the overall inadequate fairness of the fifth trial*, reflects transgression of the due process limitations upon governmental rights of retrial and orderly deliberateness in seeking retrial." App. B, p. 34a. (Emphasis added.)

The government successfully sought mandamus from the Court of Appeals compelling the trial judge to enter judgment on the jury verdicts and to impose sentence. *United States* v. *Dooling*, 406 F.2d 192 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969). Petitioner was then sentenced to nine years on each count, the sentences to run concurrently. The Court of Appeals affirmed.

No useful purpose would be served by reciting at length the evidence upon which petitioner's conviction was based. The facts are set out fully in the Court of Appeals' two earlier decisions in the case. See 305

[3] Because the trial judge's post-trial memorandum contains findings relevant to the claims made in this petition, that memorandum is reprinted as Appendix B to this petition. It will be cited in the petition as Post-Trial Memorandum.

F.2d at 336; 349 F.2d at 9. The questions presented by this petition pertain solely to the circumstances surrounding the testimony of two government witnesses—Joseph Valachi and Gasper Vaccaro.

A. Valachi's Appearance as a Witness

On April 16, 1968, in the middle of the trial, the government announced that its next witness would be Joseph Valachi, the government informant who gained national notoriety in 1963 when he revealed the inner workings of the Cosa Nostra at televised congressional hearings. T. 2094, 2097-99. The announcement was made in open court in full hearing of the press, T. 2209-13, but out of the presence of the jury.[1] Valachi had not been a witness at any of the four earlier trials,[2] and the government's curt disclosure of his appearance shocked and stunned defense counsel.[3] See T. 2094-97.

The consequences of the government's surprise announcement in open court were, or at least should have been, predictable. *Cf.* T. 2168-69. Literally overnight a trial that had aroused little interest, T. 2209, became

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[1] The jury had been permitted to take a short break just before Valachi's name was mentioned by the government attorney. T. 2094. Shortly after extended argument began over the propriety of calling Valachi as a witness, the jury was excused for the day. T. 2118.

[2] Indeed, until the fifth trial, Valachi had never testified for the government at any trial. T. 2161.

[3] The trial judge was not quite as surprised as defense lawyers since he had signed a writ of habeas corpus *ad testificandum*, prior to the presentation of any evidence, to permit the government to transport Valachi from a prison in Milan, Michigan. T. 2132, 2264-66. But it is apparent that the trial judge did not expect the announcement of Valachi's appearance to be made in open court. T. 2095.

headline news in New York newspapers and the subject of repeated reports on radio and television news programs. E. 2216-17, 2230, 2234-37. Perhaps the most comprehensive and most prejudicial story appeared in the New York Daily News on the morning of April 18, 1963, under the banner headline "CALL VALACHI IN COSA TRIAL." The Daily News story is reproduced in footnote 6 of the Court of Appeals' opinion. App. A. pp. 82a-87a. The Court of Appeals succinctly summarized the most damaging aspects of the resultant publicity:

> "[T]aking the publicity at its worst it indicated that the appellants were connected to the Cosa Nostra; that Persico was nicknamed the Snake and had graduated out of the Profaci mob; that a special prosecutor from the Department of Justice was trying the case; that Valachi was a former underworld figure who had previously testified concerning organized crime; that the government was concerned for Valachi's safety; and that the admissions about which Valachi was to testify had been made to him while appellants were in prison." App. A. p. 84.

The barrage of publicity prompted the trial judge to question the jurors and alternates to determine the extent to which they had been exposed to the news reports. E. 2200-2207. The Court of Appeals summarized as follows the results of that inquiry:

> "Three jurors stated they saw only newspaper headlines; ten had read all or part of the article in the New York Daily News and one had read the account contained in Newsday, a Long Island newspaper. In addition, some of the jurors stated that they were exposed to radio and television reports of the trial, which contained essentially the same material appearing in the newspaper articles. It

> is also possible that at least one of the jurors read the articles contained in the New York Times and/or the New York Post." App. A, p. 8a, n. 7.

The trial judge admonished each juror to disregard the contents of the news reports, and he asked each juror if he or she could decide the case fairly despite the publicity. One juror said she did not know whether her decision would be influenced by the publicity. T. 2290. The others said they felt they could render a fair and impartial decision.

The trial judge then denied defense motions for a mistrial and Valachi was permitted to testify. Valachi's testimony related to conversations he had had several years earlier with two of the defendants in a New York City jail. As to the first conversation, with defendant Albanese in June 1961, Valachi testified:

> "Well, he [Albanese] went on to tell me that this fellow Chink used to go out with him and his friends,[7] and he mentioned Junior and—" T. 2781.[8]
>
> * * *
>
> "Then he went on to tell me how this Chink used to go out with him on hijacking and—including the Aker job . . . . Including the one they were arrested for." T. 2786-87.

Motions for a mistrial based on that testimony were denied.

As to the second conversation, one with defendant Persico in 1959 or 1960 at which petitioner and de-

[7] Petitioner's trial counsel noted that, when Valachi spoke the words "his friends," he nodded toward the defense table where petitioner and his co-defendants were seated. T. 2783.

[8] Vaccaro is known as "Chink" and Persico is known as "Junior."

fendant Albanese were present. T. 2789. Valachi testified as follows:

"Q. Mr. Valachi, what did this conversation relate to?

"A. Junior called Albanese and McIntosh. He wanted them to hear what he was going to ask me.

* * *

"Q. Will you tell us the subject matter of the conversation, did it relate to any

* * *

"A. He wanted some advise [sic]. He knew I'd been around. I knew who he was, he knew who I was, through friends. He wanted to know that he told me he'd been paying taxes on all the hijackings that he's been pulling especially the one that he was on trial for, the Aker's truck. He paid Joe Profachi [sic] $1800. He wanted to know if he was in his rights having trouble with Joe Profachi.

"Well, in my experience I was astounded —

* * *

"Q. Will you give us the rest of the conversation, please?

"A. I told him it was not taxes at all, it was an out and out shakedown and he was 100 per cent right in having trouble with Joe Profachi.

"Q. Did Mr. Persico say anything to Mr. Albanese or to Mr. McIntosh in your presence?

"A. He told them in the future, 'Pay attention to Joe. Listen to him. You want any advise [sic], ask him.' That's all." T. 2790-93.

Again, motions for a mistrial based on Valachi's version of the conversation were denied. Subsequently, the trial judge instructed the jury that Valachi's testimony could be considered only against Albanese and Persico. T. 2948-50, 4510-11.

inhibit cross-examination. T. 1552-53. The trial judge also noted that two defendants in the case had already been shot. T. 1561; see also notes 1 & 2, *supra*.

Subsequently, Vaccaro returned to the witness stand and, out of the presence of the jury, said he did not wish to answer the questions because "I fear for my life." T. 1658. The trial judge then denied motions to compel answers or to strike Vaccaro's testimony on the grounds that "[his Vaccaro's] identity is known to the defendant and that the testimony sought to be adduced . . . would not materially add to the attack on the witness' character, since they are only collateral issues." T. 1661. The trial judge also stated there was "no reason whatever to doubt the sincerity of the witness' statement that his unwillingness to testify as to his residence since he left prison is based on the ground that he fears for his life." T. 1661. As a result of these rulings, the only information obtained concerning Vaccaro's background since he had left prison three years earlier was that he was then working in a factory and that he had previously been unemployed for three months and worked short periods as a short order cook, a hamburger grill man, and a part-time dishwasher. T. 1640-44.

REASONS FOR GRANTING THE WRIT [11]

1. Only the government knew that it would call Valachi as a witness.[12] Therefore, it had exclusive control over the timing and place of the announcement

[11] In addition to the reasons discussed below for granting the writ, petitioner adopts by reference any other grounds for relief asserted by his three co-defendants in the separate petition they will file with the Court.

[12] Although the trial judge had signed the necessary papers to make Valachi available at the trial, see note 5, *supra*, he clearly

of Valachi's imminent appearance at trial. In addition, the government was quite conscious that its decision to call Valachi would cause a furor at trial. See T. 2115. Finally, the government had been specifically admonished by the trial judge to reveal to him and to defense lawyers privately any witness not on the government's pre-trial witness list before making such a revelation in open court. T. 2095.

Under these circumstances, it was clear misconduct for the government to make its surprise announcement, without any warning, in open court. Such a public announcement in the presence of news reporters served absolutely no legitimate government trial interest. The only conceivable "advantage" to be gained from the public announcement was greater public attention for the trial through the news media. The government achieved that result and, in the process, shattered any hope that the petitioner might obtain a fair trial before an impartial jury.

Had the government complied with the trial judge's admonition and revealed Valachi's pending testimony privately, there would have been an opportunity to explore possible prophylactic measures to keep from the jury the publicity that would inevitably flow from Valachi's appearance. For example, the jury could

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did not know that the government had decided to call Valachi as a witness.

At trial, the government made a disingenuous effort to attribute to defense counsel an awareness of Valachi's impending testimony. At a proceeding prior to the fourth trial, one defense lawyer had made passing reference to Valachi as a possible government witness. T. 2124-30. However, Valachi did not appear as a witness at the fourth trial and, as the trial judge observed, "it is very difficult to see how even a suspicious adversary could have anticipated that Valachi would be called." Post-Trial Memorandum, App. B, p. 23a.

have been sequestered until the end of the trial. Or there could have been an agreement to keep Valachi's appearance secret until he actually entered the courtroom and then to take measures to keep the resultant publicity from the jury.[13] But none of those measures were possible when the government made the deliberate decision to announce Valachi's forthcoming testimony in open court without prior warning to defense counsel and the trial judge.

This Court has long recognized that the government's obligation in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court also aptly stated the scope of the obligation imposed on a prosecuting attorney:

> "He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

The government in this case clearly breached its obligation to assure petitioner a trial before an impartial jury by disclosing Valachi's imminent appearance at trial in a manner calculated to assure maximum impact of the prejudicial publicity on the jury.

That the publicity was highly prejudicial is beyond dispute. Newspaper stories and news broadcasts not only linked petitioner and his co-defendants with the Cosa Nostra, but also recited that petitioner had been

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[13] When the jury was excused for the day shortly after the government announced that Valachi would be its next witness, the trial judge gave no admonition that the jurors should not read news reports of the trial. See T. 2118.

tried four times previously for the same crime and had met Valachi while he was in prison. In his Post-Trial Memorandum, the trial judge stated that "[t]he publicity was certainly, by legal standards, prejudicial matter."[11] App. B, p. 24a. It is also established beyond dispute that the jurors received broad exposure to the intensive and highly prejudicial publicity. As the trial judge commented at trial:

> "Now, I think it is idle to say that prejudicial matter has not been published in the newspapers and come to the notice of the jurors; they have said so. That it is prejudicial by the standards by which prejudice is measured for any proper purpose for which prejudicial statements can be measured seems to me self-evident." T. 3603.

It is clear, therefore, that the government's misconduct had its calculated effect of depriving petitioner of his Sixth Amendment right to a fair trial before an impartial jury. For that reason alone, petitioner's conviction must be reversed.

2. Even apart from the government's culpability for the prejudicial publicity that infected petitioner's trial, the very fact of that publicity deprived petitioner of a fair trial and compels a reversal of his conviction under the principles declared by this Court in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). Both courts below rejected this argument by stressing that the publicity did not relate to petitioner's guilt of the crime for which he was being tried and that the jurors

[11] Despite the trial judge's express findings on the issue of whether the publicity was prejudicial, the Court of Appeals inexplicably stated that "the publicity was not inherently prejudicial." App. A, p. 12a. It is, of course, clear that the trial judge's findings on the issue of prejudice are entitled to more weight than the Court of Appeals' assertion to the contrary.

indicated on voir dire that they could reach a verdict uninfluenced by the publicity. Neither conclusion will withstand analysis.

To suggest that the publicity was somehow less harmful because it did not accuse petitioner of the crime charged is to wink at reality. It would have been easier for petitioner to meet that accusation at trial than it was to counteract news stories linking him to the dreaded Cosa Nostra. *Cf. Marshall v. United States*, 360 U.S. 310, 313 (1959). Indeed, the trial judge repeatedly told the jurors when he questioned them about the news stories that "[t]here is no place where they [the defendants] can defend themselves" against the link with the Cosa Nostra, T. 2381, and that "these men cannot defend themselves against [the Cosa Nostra charge], they can't come in and try to negative this at all." T. 2355. The inevitable effect of the news stories was to cast an aura of criminality about petitioner in the minds of the jurors.

Similarly, whether the publicity deprived petitioner of a fair and impartial trial cannot be resolved merely by reference to assurances by the jurors that they can reach an impartial result despite the publicity. For example, in *Marshall v. United States*, 360 U.S. 310, 312 (1959), this Court was not persuaded by the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against the petitioner as a result of the articles." See also *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Even the trial judge here said:

> "I think it would be rather difficult to say that the jurors reading this material could look at the evidence in quite the same way. . . . I think it

> can be taken as given that they have read this material intelligently and that they would be superhuman if they were able to present to us a reliable estimate of its affect on their judgment." T. 3268-69.

The trial judge also concluded that interrogation of individual jurors concerning the impact of the pre-judicial publicity cannot be conclusive under this Court's decision in *Sheppard v. Maxwell*, *supra*. T. 3268. Such interrogation is specially inconclusive when, as here, not all the jurors give assurances of impartiality. See T. 2391.

It is equally clear that in addition to the jurors' disregard the prejudicial publicity are powerless to cure the prejudice. In *Bruton v. United States*, 391 U.S. 123, 135 (1968), this Court recognized that curative instructions will be wholly ineffective where the risks are great that the jury will not follow them and where a defendant will suffer severe consequence from such a failure. In this case, the publicity about Valachi exposed the jury to information that would have been clearly inadmissible if offered by the government. Further, the prejudicial publicity transformed petitioner and his co-defendants, who were virtually unknown to the jurors at the start of the trial, into members of a sinister and dreaded secret criminal organization. Only "superhuman" jurors could put that invidious effect aside in their deliberations.

While the prejudicial publicity in this case was not of the same volume and duration as that in *Sheppard v. Maxwell*, *supra*, its impact was no less shattering to petitioner's hope for a fair trial. In light of jury disagreements as to petitioner's guilt or innocence in two previous trials, the reversal of this conviction in two

others and the "merely marginal fairness" of the fifth trial, it would be hard to say that publicity of even a low degree of virulence would not have been influential in producing a conviction at the fifth trial. The publicity here, by comparison, had an absolutely pestilential effect, amounting to a denial of petitioner's Sixth Amendment right to a trial by an impartial jury.

3. Valachi's testimony about his conversations with Albanese and Persico violated petitioner's Sixth Amendment right to confront the witnesses against him, as that right was defined by this Court in *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, this Court ruled that testimony about an out of court incriminatory statement by one defendant which implicates a co-defendant is reversible error as to the co-defendant when the defendant who made the statement does not testify and thus is not subject to cross-examination. *Bruton* specifically held that instructions that the jury should consider the statement only against the defendant making it are not "an adequate substitute for the petitioner's constitutional right of cross-examination." 391 U.S. at 137. Although the Court conceded that limiting instructions might be effective to counteract some forms of inadmissible evidence, the Court also recognized that

> "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequence of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135.

The "risk" and "consequences" that the Court contemplated are surely present in this case.

In the conversation with Albanese that Valachi related, Albanese said that he and "his friends" went out on hijackings together, including the Akers job for which "they" were arrested. T. 2781, 2786-87. Without analysis, the Court of Appeals simply rejected petitioner's claim that he was implicated in the offense charged by Albanese's reference to "his friends" and "they." But petitioner's claim cannot be so lightly dismissed. The jury could well have understood that "his friends" and "they" included more persons than Vaccaro and Persico, both of whom Albanese referred to by name. It would seem inevitable that the jury would proceed from that understanding to the conclusion that those charged with Albanese in the conspiracy count were the "friends" and the "they" to whom he was referring.[15] There was at least a great "risk" that the jury would identify petitioner as one of the "friends" implicated by Albanese in the crime charged, and limiting instructions could not obviate that risk.

Valachi's account of his conversation with Persico was even more damaging to petitioner. Valachi began that portion of his testimony by stressing that Persico summoned petitioner and Albanese to hear what he had to say to Valachi. T. 2790. Then, as related by Valachi, Persico complained that he had been forced to pay "taxes" to Profaci "on all the hijackings he's been pulling," including the one for which petitioner was being tried. T. 2792. Finally, Persico admonished petitioner and Albanese to pay attention to Valachi and to seek out his advice and counsel. T. 2793.

[15] There can be no doubt that the implicated co-defendant need not be identified by name in the incriminating statement. See *United States* v. *Serio*, 401 F.2d 989 (D.C. Cir. 1968) (identification of appellant as "another man" sufficient for application of the *Bruton* rule).

Both courts below rejected petitioner's *Bruton* grounded objection to the testimony because Persico did not in express terms accuse petitioner of participation in the criminal [illegible] Valachi could have been cross-examined as to whether he observed any acquiescence by petitioner in the command that he pay attention to Persico. But that reasoning ignores the essential basis for the objection. From what appears in the record, the whole point of Persico's conversation with Valachi was to complain about Profaci's demand for a share of the proceeds of several hijackings, and particularly the hijacking of the Akers truck. But, before he spoke to Valachi about those matters, Persico took special pains to have petitioner and Albanese in a position to hear the conversation. To the jurors, there could have been only one explanation for Persico's desire that petitioner and Albanese listen to the conversation: petitioner and Albanese had an interest in the proceeds of the hijackings Persico discussed. Consequently, Valachi's account of the conversation with Persico linked petitioner to the crime for which he was being tried as firmly as if Persico had accused him of complicity.

To rule, as the court below did, that an express statement of complicity is essential to invoke the *Bruton* rule would be to substitute formalism for the substance of the constitutional right to confront witnesses. Because neither Albanese nor Persico testified, Valachi's account of his conversations with them deprived petitioner of his Sixth Amendment right of confrontation, as the right was defined by *Bruton*.

4. The restrictions placed by the trial judge on the scope of cross-examination of Vaccaro present im-

portant questions concerning the application of this Court's decision in *Smith* v. *Illinois*, 390 U.S. 129 (1968), and petitioner's Sixth Amendment right to confront the witnesses against him. These restrictions, and their endorsement by the Court of Appeals, represent a clear departure from the letter and spirit of the *Smith* decision and the Sixth Amendment.

In *Smith*, after noting that the key prosecution witness had given a false name and that "the petitioner was denied the right to ask the . . . witness either his name or where he lived," the Court stated:

> "[W]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." 390 U.S. at 131.

This was no novel principle of law. The Court was simply reaffirming and applying to state trials its earlier decision in *Alford* v. *United States*, 282 U.S. 687 (1931), which noted that "[p]rejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test." 282 U.S. at 688.

The reasons given by the trial judge for restricting the scope of cross-examination are simply at odds with this Court's decisions. First, the trial judge thought information about Vaccaro's present and former addresses and places of employment was unnecessary be-

cause the witness' identity was known to the defendants. P. 1661. In *Smith*, however, even though the cross-examiner knew the witness in question and had even represented him previously, 390 U.S. at 131, n. 6, this Court ruled it was improper to prevent inquiry into the witness' current address. Accord *United States* v. *Garafalo*, 385 F.2d 200 (7th Cir. 1967), *rev'd per curiam*, 396 F.2d 952 (7th Cir. 1968); *United States* v. *Lyon*, 397 F.2d 505 (7th Cir. 1968); *United States* v. *Pickens*, 417 F.2d 958 (8th Cir. 1969).[16] In this case, petitioner knew who Vaccaro was because Vaccaro had testified at the previous trial. However, four years had elapsed since his prior testimony, and Vaccaro had been released from prison during that interval. Petitioner had no knowledge of the community in which Vaccaro had been living since his release from prison, and the questions foreclosed by the trial judge sought to elicit that information.

A second reason given for limiting cross-examination was that "the testimony sought to be adduced . . . would not materially add to the attack on the witness'

[16] In three decisions subsequent to *Garafalo* and *Lyon*, the Seventh Circuit has been somewhat more restrictive in the latitude permitted on cross-examination under the *Smith* rule. See *United States* v. *Lee*, 413 F.2d 910 (1969); *United States* v. *Lawler*, 413 F.2d 622 (1969); *United States* v. *Teller*, 412 F.2d 374 (1969). But all three of those decisions are distinguishable under the facts of this case. In both *Teller* and *Lee*, defense counsel were permitted to develop on cross-examination that the witness had received special consideration from the government for his testimony. In *Lawler*, the testimony of the witness in question was not important to the government's case.

In *United States* v. *Norman*, 402 F.2d 73 (9th Cir. 1968), the court sustained a limitation on cross-examination when the witness invoked the privilege against self-incrimination.

opinion in *Smith* suggested that the Court's holding in that case would be limited in situations in which "inquiries . . . tend to endanger the personal safety of the witness." 390 U.S. at 133-34. And some lower courts have ruled that restrictions on cross examination are proper where there is proof of actual threats of harm to the witness. *United States* v. *Baker*, 419 F.2d 83, 87 (2d Cir. 1969); *United States* v. *Palermo*, 410 F.2d 468, 472 (7th Cir. 1969), or where there was evidence of danger to the witness and the defendant gave no reason for the inquiries. *Kirschbaum* v. *United States*, 407 F.2d 562, 565 (8th Cir. 1969).[17]

In this case, there is no proof of any actual threats made to Vaccaro to substantiate his testimony that he feared for his safety if he revealed his addresses and places of employment. In fact, since his testimony about his fears is wholly uncorroborated,[18] the ruling amounts to making Vaccaro the arbiter. The trial judge simply stated there was no reason to doubt the sincerity of Vaccaro's assertion that he feared for his life. T. 1661. However, when information is sought for the very reason of attacking a witness' credibility, it is wholly anomalous to deny that information on the basis of the witness' apparent sincerity.

[17] In both *Baker* and *Palermo*, despite proof of actual threats against the witnesses, inquiry into prior addresses was permitted. In this case, even prior addresses were denied petitioner.

[18] The government's only effort to substantiate Vaccaro's testimony was an observation that a witness in *another* case in the same court recently had been killed or had disappeared. T. 1552. The trial judge noted that two defendants in this case had been shot previously. T. 1561; notes 1 & 2, *supra*. But there was no proof or suggestion that any witnesses in the case had been threatened or harmed.

Consequently, because there was inadequate proof of any danger to the witness and because an adequate foundation was laid for the inquiries, petitioner was denied his Sixth Amendment right to confront the witnesses against him when inquiry into Vaccaro's present and past addresses and places of employment was foreclosed. The resultant error can in no sense be considered harmless or inconsequential. Vaccaro's testimony was critical to the government's case, and an attack on his credibility was essential to the defense. It is precisely for that reason that, absent exigent circumstances, the Sixth Amendment demands that petitioner be allowed the broadest possible latitude in cross-examining Vaccaro. The record is barren of any exigent circumstances that would justify curtailment of petitioner's Sixth Amendment rights.[19]

[19] A *Smith-Alford* issue also arose in connection with the testimony of Joseph Cancelli, another government witness. When asked out of the presence of the jury why he declined to reveal his address, Cancelli responded, "for personal reasons. . . . I just don't want to give it for my family." T. 3194-95. The trial judge declined to require Cancelli to answer the question and the Court of Appeals affirmed that ruling, in part because Cancelli's testimony "was not of central importance" to the government's case. App. A. p. 16a. However, there was absolutely no evidence that Cancelli feared for his safety or his family's. In fact, unlike Vaccaro, he did not even express such a fear. A plausible explanation for his words "for personal reasons" and "for my family" is that Cancelli simply wanted to shield himself and his family in their community from any publicity that might result from his testimony. Absent some evidence of fear for a witness' safety, there can be no justification for limiting cross-examination. The rulings of the courts below on the Cancelli testimony simply illustrate the consistent refusal of those courts to afford petitioner his Sixth Amendment rights, as defined by *Smith* and *Alford*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 1970

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 156, 157, 158, 159—September Term, 1969.

(Argued January 23, 1970 Decided April 15, 1970)

Docket Nos. 33016, 33119, 33225, 33231

UNITED STATES OF AMERICA, *Appellee*,

—v.—

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SPERO, and HUGH MCLEAN, *Appellants*.

Before: MOORE, HAYS and FEINBERG, *Circuit Judges*.

Appeal from an order entered in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, denying a motion to dismiss the indictment; and from conviction after a jury trial in the United States District Court for the Eastern District of New York, John F. Dooling, *Judge*, on a charge of robbery of interstate shipment under false commercial bills in violation of 18 U.S.C. § 2 (1951 (1964)) and of conspiracy to commit such a robbery.

Affirmed.

MAURICE EDELBAUM, New York, N. Y. (CHARLES K. FOSTER, New York, N. Y., of counsel), for *Appellant Persico*.

ROBERT KASANOF, New York, N. Y., for *Appellant Albanese*.

FRANCES T. WOLFF, New York, N. Y. (JEROME LAW, New York, N. Y., of counsel), for *Appellant Spero*.

EDWARD A. ROGER, New York, N. Y., for *Appellant McLean*.

ROBERT M. OSTERER, Special Attorney, Department of Justice, Brooklyn, N. Y. (THOMAS M. KEEGAN, Attorney, Department of Justice, Washington, D.C., EDWARD R. NEAHER, United States Attorney, Eastern District of New York, on the brief),

HAYS, *Circuit Judge*:

Carmine Persico, Salvatore Magnese, Ralph Spero and Hugh McIntosh appeal from judgments of conviction entered after a jury trial in the United States District Court for the Eastern District of New York on a charge of robbery of merchandise moving in interstate commerce 18 U.S.C. § 1951 (1964) and of conspiracy to commit the robbery.[1] Appellants also appeal from the denial of their pretrial motion to dismiss the indictment "on the ground that the long delay and repeated trials have seriously prejudiced them and constitute, in effect, cruel and unusual punishment."

I.

Background.

The appellants have been tried five times on an indictment filed in April 1960 charging them with hijacking and conspiring to hijack a truck loaded with piece goods from the Akers Motor Lines Terminal in Brooklyn on or about July 28, 1959. The first trial, in May 1961, ended in a jury disagreement. The second trial, in June 1961, resulted in convictions of the present appellants on both counts.[2] We reversed these convictions because of errors at trial. *United States v. Persico*, 305 F.2d 531 (2d Cir. 1962). The third trial in the spring of 1963 was aborted as to appellants

[1] Persico and McIntosh received sentences of fourteen and nine years respectively on each count, the sentences to run concurrently. Albanese and Spero received suspended sentences of ten years on each count, the sentences to run concurrently, and were placed on probation.

[2] Joseph Magnasco was convicted on both counts, but was shot and killed before sentencing. George La Fante was convicted on the conspiracy count only. At the trial of the present case Judge Dooling directed La Fante's acquittal for lack of sufficient evidence.

Persico, Albanese and Spero[3] by the declaration of a mistrial. The jury disagreed as to the other defendants. The fourth trial, which lasted from January to April 1964 resulted in the conviction of all the appellants. We reversed these convictions because of errors in the trial judge's charge. *United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965).

The fifth trial which is the subject of this appeal took place in April and May of 1968. The jury returned verdicts of guilty on May 9, 1968. On October 11, 1968, in response to appellants' post trial requests for relief, the trial judge distributed to all parties copies of a memorandum and order which he intended to file, dismissing the indictment. The decision to dismiss was based on Judge Dooling's conclusion:

> "that the history of the present case through the date of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the governmental rights of retrial and orderly deliberateness in seeking retrial . . . . It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process.
>
> "On these grounds it is concluded that Counts 1 and 2 of the indictment must be dismissed by appropriate order as to the moving defendants."

The Government sought mandamus from this court ordering Judge Dooling to enter judgment on the jury verdicts and to impose sentence. We granted the relief requested.

[3] This mistrial was ordered because Persico was shot and wounded on a Brooklyn street.

United States v. *Poellnitz*, 403 F.2d 192, 198 (2d Cir.), cert. denied, 395 U.S. 914 (1969).

The factual background of the case is relatively simple and has been adequately reported in our earlier opinions. See 305 F.2d at 326, 349 F.2d at 9. As in the earlier trials, the government's case in the latest trial was based primarily on the testimony of Casper Vaccaro, an alleged co-conspirator, and Edward Kennedy, an employee of Akers Motor Lines and driver of the hijacked truck.[1] However, at this trial for the first time the government called as a witness Joseph Valachi, who recounted certain admissions alleged to have been made by several of the appellants.

Appellants do not attack the sufficiency of the evidence, but make numerous claims of error. We are not persuaded that any of these allegations warrant reversal and therefore affirm the judgments of conviction.

II.

Failure of the Government to Inform the Defense That Joseph Valachi Was to Be Called as a Witness

Appellants contend that the failure of the government to give advance notice of its intention to call Joseph Valachi as a witness requires reversal. Valachi achieved notoriety as a result of his testimony concerning organized crime before a Senate Committee in 1963 and elsewhere. Appellants maintain that the failure to inform them of Valachi's impending appearance prevented their suggesting prophylactic measures to counter the possibility of prejudicial publicity, and deprived them of a proper voir dire of the jury and the full advantage of their peremptory challenges.

There is no obligation on the part of the government to inform the defense of its intention to call a witness when the indictment is for a non-capital offense. See 18 U.S.C. § 3432 (1964); *United States* v. *Van Duzee*, 140 U.S. 169,

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[1] Their testimony is summarized in *United States* v. *Persico*, 305 F.2d 534, 535 (2d Cir. 1962).

173 (1891); *Thompson* v. *United States*, 381 F.2d 664, 665-66 (10th Cir. 1967); *United States* v. *Chase*, 372 F.2d 453, 466 (4th Cir.), cert. denied, 387 U.S. 907 (1967); *Dean* v. *United States*, 265 F.2d 541, 547 (8th Cir. 1959).

Appellants' suggestion that the government intentionally and affirmatively misled them into believing that no new witnesses would be called is expressly contradicted by the record.

III.

Publicity Surrounding the Appearance of Valachi

Shortly after 3:00 P.M. on April 16, 1968, the government indicated its intention to call Joseph Valachi as its next witness. The defense pleaded surprise,[5] objected to Valachi's appearance and questioned his testimonial capacity. The argument on these issues lasted the rest of the day.

That evening and the next morning all the New York newspapers and many of the radio and television stations carried news announcements stating that Valachi was to be called as a witness. Many of these announcements contained details about the trial and the defendants. The article from the Four Star Edition of the April 17, 1968, New York Daily News, which most of the jurors saw, appears in the margin.[6]

[5] Appellants allege that the government had "leaked" the news of Valachi's appearance to the press, thus aggravating the publicity problem. The government strongly denies the accusation and, given the tenuous nature of the appellants' "proof," we do not consider this a relevant factor in determining whether the publicity requires reversal.

[6] The front page of the Daily News contained in one and one half inch letters the headline: "CALL VALACHI IN COSA TRIAL." The story on page two was headed "Call Valachi to

Testify in Hijack Trial". Pictures appeared of Judge Dooling, Persico and Valachi. The text of the articles states:

"The government dropped a bombshell into the Kidnaking trial of Cosa Nostra figure Carmine (The Snake) Persico and four others when it announced yesterday that it will call underworld informer Jo Valachi as a witness.

"Victor Woerheide, special prosecutor trying the case for the Department of Justice in Brooklyn federal court, introduced his shocker first before 1 p.m. after the jury had been dismissed for the day. Woerheide said Valachi would be called today.

"However, this set off two hours of legal wrangling in the courtroom before U.S. District Judge John F. Dooling Jr. And Dooling put off Valachi's appearance until 2 p.m. Monday.

"This was to give the defense time to prepare for the appearance of the star informant for the FBI, and to inspect records in Washington. The defense lawyers had claimed that Valachi's testimony would make it impossible for their clients to get a fair trial.

"*First Court Appearance*

"Valachi, the gravel voiced songbird whose mouthings on the Mafia before the Senate rackets committee in 1963 startled the nation, has never appeared in open court, although he has testified before grand juries.

"Valachi has been brought from the maximum security of the federal prison in Milan, Mich., and is under tight guard in the U.S. Courthouse in Brooklyn. Only federal marshals are permitted near him.

"According to Woerheide, Valachi will testify about two admissions made by three of the men on trial.

"These admissions are statements made by the defendants about themselves and relevant to the matter on trial," Woerheide told the court. The statements were made in April 1959 and June 1961, he said.

"Persico, 35, of 144 Sunset Drive, West Hempstead, L.I., graduated out of the Profaci mob that rules Brooklyn to a setup of his own, the government contends. He and the four other defendants are charged with stealing a $50,000 shipment

Not all of the jurors were exposed to the same quantity or quality of publicity.[1] However, taking the publicity at its worst it indicated that appellants were connected to the Costa Nostra; that Persico was nicknamed the Snake, and had graduated out of the Profaci mob; that the case had been tried four times previously; that a special prosecutor from the Department of Justice was trying the case; that Valachi was a former underworld figure who had previously testified concerning organized crime; that the government was concerned for Valachi's safety; and that the admissions about which Valachi was to testify had been made to him while appellants were in prison.

The publicity to which the jurors were exposed did not deal with the issues of appellants' guilt, as in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), and *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); but involved background information. Most of the material, save the reference to Costa Nostra which we believe to have been dealt with effectively, was brought out at trial as competent evidence.

The three weeks that passed before the jury was called upon to make its decision also served to blunt much of the adverse effect of the publicity. See *United States* v. *Kahaner*, 317 F.2d 459, 470 (2d Cir.), cert. denied, 375 U.S. 836 (1963).

Appellants moved for a mistrial on the ground that the publicity prejudiced the jury, making it impossible for them to receive a fair trial. The trial judge took prompt and effective corrective action. See *United States* v. *Agueci*,

[1] The fourteen jurors and alternates were examined separately. Three jurors stated they saw only newspaper headlines; ten had read all or part of the article in the New York Daily News and one had read the account contained in Newsday, a Long Island newspaper. In addition, some of the jurors stated that they were exposed to radio and television reports of the trial, which contained essentially the same material appearing in the newspaper articles. It is also possible that at least one of the jurors read the articles contained in the New York Times and/or the New York Post.

310 F.2d 817, 832 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). He held a separate voir dire of each juror, frankly and candidly discussing the problems caused by the publicity. He correctly isolated the reference to the Cosa Nostra as the most potentially prejudicial aspect of the publicity and placed that element in its proper perspective by instructing each juror that it was completely irrelevant to the case.[8] After completing this process and

[8] For example, the voir dire of juror Charles Cohen went as follows:

"The Court: Mr. Cohen, we are quite concerned about whether or not the newspaper, radio and television publicity that our case has received might have had some affect [sic] on the Jury's attitude towards the case, and I do want to ask some questions about that.

"Did you have a chance, Mr. Cohen, to read any of the newspaper articles or to hear any of the radio or television material?

"Mr. Cohen: Yes, sir, I did.

"The Court: Did you see the Daily News article?

"Mr. Cohen: Yes, I did.

"The Court: I think that had the completest material.

"Mr. Cohen: I did.

"The Court: Did you see the Times article?

"Mr. Cohen: No.

"The Court: Now has there been any discussion of the articles and of the radio and television material in the Jury room?

"Mr. Cohen: I wouldn't say exactly discussion, there might have been a mention that this person read it, someone else said they bought the paper and tore it off the front page, that they didn't wait to go any further, and that was about the general extent.

"The Court: Was there any talk about the pictures that were in the Daily News?

"The Witness: There was one mention of your picture.

"The Court: I am never going to live this down.

"Mr. Cohen, as you know, this case is about one thing and one thing only, and that is this:

"Whether or not the defendants or some of them did or did not obstruct the movement in interstate commerce

carefully considering the problem, Judge Dooling concluded that, although the publicity was prejudicial, the jurors remained capable of giving the appellants a fair trial. In denying a motion for mistrial, he stated:

"Some very considerable part of the prejudicial matter is strongly implied by other evidence properly in the case, by the competent substance of Valachi's testimony and its essentially indivisible nature and by the very calling of Valachi as a witness and the identifying of his criminal record.

> of that Ages [sic] truck by robbery, or whether one or more of them conspired with the others about that.
>
> "It is not about anything else.
>
> "Now, if any effort had been made to introduce into this Courtroom here testimony about Cosa Nostra, it would have been excluded because it has absolutely nothing to do with whether or not these defendants interfered with that truck shipment. Just because that couldn't be brought in against them, for the same reason these men cannot defend themselves against it, they can't come in and try to present the testimony to negative this at all.
>
> "As a matter of fact there isn't any such crime as Cosa Nostra, you can't be indicted for Cosa Nostra in any Court anywhere, and so these men have never had a chance to meet that charge anywhere, and they never will be able to come into a Court and blast it out of the water.
>
> "It is a smear and it pursues them and there is nothing they can do about it, it is just talk and they can't meet it no plea, and they can't even meet it here today because it has nothing to do with this case.
>
> "Nevertheless, there it is, it has been said.
>
> "Now what we have to try to figure out is whether or not the fact that it has been said and the way it has been said and that it comes inevitably to the notice of you Jurors means we are in trouble in assuring them the fair trial that each one of us wants to see that they get, and the Jurors most of all.
>
> "So what I want to ask you is whether notwithstanding the publicity, you can say whether or not you are satisfied about your capacity to listen to the evidence in this case and to no other evidence, no other talk, and decide this case

"But the publicity and the other circumstances attending Valachi's testimony, added to the inevitable and inescapable atmosphere and tensions of this trial, is not accurately measurable; but I am unable to find indications that it is sufficient as to prevent a fair trial.

"The existence of this readily regrettable prejudicial matter challenges the jury to be fair, to be faithful to their oaths. The jury cannot be taken to lack either the will or the capacity to base their verdict only on the evidence properly before them. The issues of fact are simple. The irrelevant prejudicial matter is easily isolated, and I find no basis for concluding that the jury will be unequal to its task."

fairly to them and to the Government without reference to this publicity.

"Do you think you are up to that or is that something that you would say is beyond the compass of the human mind?

"Mr. Cohen: No, I would say that I would be able to continue.

"The Court: Here is one way of putting it up to you, it calls upon you to perform a kind of an imaginative feat that is pretty unreal but I wish you would make the effort:

"Put yourself in the position of one of the defendants here, think of him as being on trial before this Jury, and then look into your own mind with his eyes and tell me whether or not you think that your mind, looked at with the eyes of one of the defendants, would appear to him to be the mind of the man that he wants to have stay on this Jury:

"Now, tested by that standard, what is your answer, would you be able to continue fairly to both sides in this case?

"Mr. Cohen: That would be my answer, to continue and be fair by what I hear.

"The Court: Thank you, sir.

"Now, when you go back to the Jury Room, Mr. Cohen, I would ask you not to discuss our interview with any of the other Jurors because we want to get their individual reaction.

"Mr. Cohen: I understand.

"The Court: And responses.

"Mr. Cohen: I understand, yes, sir.

"The Court: Thank you, sir."

We think this determination was correct both because the publicity objectively viewed in the setting of the trial was not so prejudicial to Persico or to his co-defendants that declaring a mistrial was the only avenue open to the trial judge, and because proper corrective procedures were employed.

The issue of whether the nature of prejudicial publicity is such that a fair trial cannot be had is always difficult and "each case must turn on its special facts." *Marshall v. United States*, 360 U.S. 310, 312 (1959) (*per curiam*). The trial judge has broad discretion in determining whether prejudice has resulted. E.g., id.; *Holt v. United States*, 218 U.S. 245, 251 (1910).

Since the publicity was not inherently prejudicial, consideration of its effect upon each juror is crucial. The essential question which had to be answered was whether the jurors retained the requisite impartiality. Judge Dooling was in the best position to make this difficult evaluation. We attach great weight to his determination that the publicity did not prevent a fair trial.

IV.

Claim That Valachi's Testimony Violated the Rule of Bruton v. United States

Each of the appellants attacks certain of Valachi's testimony as violative of the rule announced in *Bruton v. United States*, 391 U.S. 123 (1968), and declared retroactive in *Roberts v. Russell*, 392 U.S. 293 (1968) (per curiam).

Appellants' claims are addressed to two portions of Valachi's testimony. Valachi was asked about a conversation he was alleged to have had with Albanese. He answered:

"Well, he went on to tell me that this fellow Chink [Vaccaro] used to go out with him and his friends,

and he mentioned Junior [Persico] and [interruption]

. . .

"Then he went on to tell me how this Chink used to go out with him on hijackings and including the Aker [sic] job . . . ."

Persico contends that Valachi's reference to Junior, by which the jury knew he meant Persico, constitutes a violation of the *Bruton* rule since it was an inadmissible inculpating hearsay statement. We reject this contention on the ground that Valachi's statement about Junior did not inculpate Persico. What Valachi said was merely that Albanese knew Persico or, at most, that Persico was a friend of Albanese, a fact that came out in other competent testimony.

On similar grounds we reject the argument advanced by McIntosh and Spero that Valachi's statement about Albanese's reference to "his friends" must have been thought by the jury to refer to, and therefore to inculpate, them.

Valachi also testified to a conversation he had with Persico in the presence of Albanese and McIntosh who had joined them at the request of Persico. Valachi said:

"He wanted some advise [sic]. He knew I'd been around. I knew who he was, he knew who I was, through friends. He wanted to know first he told me he'd been paying taxes on all the hijackings that he's been pulling especially the one that he was on trial for, the Aker's [sic] truck. He paid Joe Profachi [sic] $1800. He wanted to know if he was in his rights having trouble with Joe Profachi [sic].

"Well, in my experience I was astounded . . .

[Interruption]

"A. I told him it was not taxes at all, it was an out and out shakedown and he was 100 percent right in having trouble with Joe Profachi [sic].

> "Q. Did Mr. Persico say anything to Mr. Albanese or to Mr. McIntosh in your presence? A. He told them in the future, 'Pay attention to Joe. Listen to him. You want any advise [sic], ask him.' That's all.
>
> "Q. When he said Joe, to whom was he referring? A. Me."

Albanese and McIntosh claim that the admission of Valachi's testimony that they were present at the time Persico admitted his part in the Akers' hijacking constitutes a violation of *Bruton*. However, as the trial court held:

> "That testimony was, however, directly descriptive of the observed acts of Albanese and McIntosh and Valachi could be fully cross-examined about what he saw and what obedience to Persico's command he observed; the testimony did not relay to the jury words of a non-testifying Persico that accused Albanese and McIntosh of complicity in the crime."

Moreover, the trial court correctly instructed the jury that complicity could not be inferred from silence.

V.

Limitations on Cross-Examination

The trial judge ruled that two of the government's witnesses, Vaccaro and Cancelli, need not disclose their addresses or places of employment. The appellants contend this limitation violated their Sixth Amendment right to confront the witnesses against them. They rely heavily on *Smith* v. *Illinois*, 390 U.S. 129 (1968), and *Alford* v. *United States*, 282 U.S. 687 (1931). In *Smith*, a crucial prosecution witness testified under a false name and the defense was not allowed to elicit his true name or address on cross-examination. The Court reversed the conviction since "The witness' name and address open countless avenues

of in-court examination and out-of-court investigation." Id. at 131. In *Alford*, the defense was prevented from obtaining the address of a crucial prosecution witness, who defense counsel had reason to believe was then in custody, id. at 693. The Court also reversed that conviction.

The Court in *Smith* quoted with approval language from *Alford*:

> "There is a duty to protect him [the witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate him." *Alford*, at 694; *Smith*, at 133.

And the illuminating concurrence of Mr. Justice White reads in pertinent part:

> "In *Alford* v. *United States*, 282 U.S. 687, 694 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to *endanger the personal safety of the witness*. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason I join the Court's judgment and its opinion which, as I understand it, is not inconsistent with these views. . . ." Id. at 133-34 (emphasis added).

It was primarily out of fear for the witnesses' personal safety that Judge Dooling limited cross-examination. We think that his determination was correct. After his con-

viction at the second trial, but before sentencing, a co-defendant Joseph Magnasco was shot dead. The third trial was aborted in 1963 because Persico was shot and wounded on a Brooklyn street. *See United States v. Bennett*, 409 F.2d 888, 901 (2d Cir. 1969), cert. denied, U.S. (19); see also *United States v. Marti*, slip opinion p. 1115 (2d Cir. Feb. 3, 1970); *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969); *United States v. Varelli*, 407 F.2d 735, 750-51 (7th Cir. 1969).

In the case of the witness Vaccaro the limitation is further justified by the fact that he was well known to all defendants and their counsel, having testified at the four previous trials. His background was explored in great detail on cross-examination and the defense was informed of the nature of Vaccaro's recent activities. Moreover, the defense showed no "particularized need" for the information requested. *United States v. Bennett, supra.* Cancelli was known to the defense since he testified at the fourth trial. His testimony was not of central importance like that of the witnesses involved in *Smith* and *Alford*.

VI.

Evidence of Other Crimes

Appellants contend that prejudicial testimony concerning other crimes was erroneously admitted. Valachi's testimony included a reference to the Akers hijacking as one in a series and mentioned that Persico, and possibly, by implication, other appellants, were involved with one Profaci.*

As the trial judge noted, Valachi's testimony as to other crimes and criminal propensity was so closely bound

* Profaci was said to head an underworld group at war with the so-called Gallo gang for control of a substantial portion of organized criminal activities. Thus appellants maintain the reference to Profaci, assuming the jury knew who he was, indicated criminal propensity.

up with his directly relevant testimony with regard to the Akers hijacking that unless the jury believed the relevant testimony it is quite unlikely that it would have been influenced by the accompanying testimony of other crimes. Moreover, much of Valachi's testimony of other crimes related to a course of conduct involving repeated instances of hijacking. This evidence was not inadmissible since it tended to support the testimony as to the Akers job.

Appellants complain of the admission of testimony about a stolen car. However since the stolen car was used in the hijacking the evidence was correctly admitted. McCormick, Evidence § 157, at 327 (1954) (quoted with approval in *United States* v. *Bradwell*, 388 F.2d 619, 622 (2d Cir.), cert. denied, 393 U.S. 867 (1968), and *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966)).

VII.

Repeated Retrials and the Right to a Speedy Trial

Appellants contend that the repeated trials, and the delay of two and one half years[10] following this court's reversal in July 1965 of the verdict in the fourth trial, violated their right to a speedy trial and constitute cruel and unusual punishment. They claim that the indictment should have been dismissed on their motions and that they should not have been subjected to a fifth trial.

The claim that the indictment should have been dismissed because of the repeated retrials of this case was made to this court after the fourth trial and was rejected and a fifth trial ordered.

As for the claim of denial of a speedy trial, it appears from the record that the defendants acquiesced in the repeated postponements. There is no indication of "pur-

[10] The delay which occurred as a consequence of defendants' motion to dismiss the indictment, denied by Judge Weinstein on December 13, 1967, cannot be attributed to the government.

,poseful or oppressive" delay on the part of the govern. ment. *Pollard v. United States*, 352 U.S. 354, 361 (1957). Moreover at no time prior to their motion in 1967 to dismiss the indictment did defendants make a motion to speed up the trial of their case or attempt in any other way to secure an early trial. See id. at 362 n. 8; *United States v. Judal*, 407 F.2d 381, 382 (2d Cir.) (per curiam) (and cases cited therein), cert. denied, 394 U.S. 1008 (1969); *United States v. Lustman*, 258 F.2d 475, 478 (2d Cir.), cert. denied, 358 U.S. 880 (1958).

As the trial judge found, the specific circumstances advanced by appellants as constituting prejudice resulting from delay are not impressive.

Albanese's witness Eppilitto died between the fourth and fifth trials. He had corroborated in part Mrs. Albanese's testimony that Vaccaro attempted to rape her. At this trial the defense did not call Mrs. Albanese perhaps because Valachi testified that Albanese admitted that the rape story had been fabricated. If Mrs. Albanese had testified, appellant could have read Eppilitto's prior testimony into the record. Moreover the government was ready to go to trial while Eppilitto was still alive and the trial delay past that point was not occasioned by the government.

Some possible witnesses to the hijacked truck's standing empty on the street had disappeared by the time of the instant trial. However, the F.B.I. memorandum disclosing the existence of these witnesses was admitted into evidence. The witnesses were not called at the fourth trial though they were then available.

The last special circumstance cited by the appellants was the failure of Gehring, who was terminal manager of Akers in 1959, to recall events to which he had testified in 1964. However, not only was Gehring a witness for the government, but his previous sworn testimony was available for use at this trial.

APPENDIX B

Proposed District Court Memorandum and Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

60 CR 117

UNITED STATES OF AMERICA

against

CARMINE PERSICO, SALVATORE ALBANESE, RALPH SCOPO,
HUGH MCINTOSH, *Defendants.*

60 CR 117

Appearances:

MAURICE EDELBAUM, Esq.,
(LAWRENCE K. FEITELL, Esq., of Counsel),
for defendant Persico

ROBERT KAVANOR, Esq.,
for defendant Albanese

FRANCIS P. WORTH, Esq.,
for defendant Scopo

EDWARD A. ROSNER, Esq.,
for defendant McIntosh

[illegible] C. [illegible], Esqs. and
[illegible] M. OKSTEIN, Esq., Department of Justice,
[illegible] P. HUGEL, Esq., United States Attorney,
for the Government

Counts 1 and 2 of the indictment in the [illegible] counts were submitted to the jury. De[illegible] defendant, acquitted on Count [illegible] had been acquitted on Count 2; the con-

spiracy count, by direction when the Government rested in the present trial. The four remaining defendants have now moved (a) to set aside the verdicts and dismiss the indictment, (b) to set aside the verdicts and enter judgments of acquittal, Rule 29(c), and (c) for a new trial on the ground that one is required in the interests of justice, Rule 33.

The first trial of the two counts, in May 1961, ended in disagreement; the second trial resulted in June 1961 in conviction of the four moving defendants on both counts and of La Fante on Count 2 only; the convictions were reversed in July 1962, 305 F.2d 534; the third trial, taking place in May 1963, ended in a mistrial as to the defendants Persico, Albanese and Spero, and in a disagreement as to defendants McIntosh and La Fante; the fourth trial, conducted in January-April 1964, resulted in the conviction of the moving defendants on Counts 1 and 2 and of defendant La Fante on Count 2; the convictions were reversed in July 1965, 349 F.2d 6, and the case was remanded for a new trial. The fifth trial commenced on April 3, 1968, and the verdicts were returned on May 9, 1968.

The defendants moved before trial to dismiss the indictment on the ground of the Government's failure to accord them a speedy trial and its failure duly and timely to prosecute the case, and on the grounds that further prosecution would put them in double jeopardy and would violate their rights to due process through oppressive re-trial; and they moved also that the Court enter an order barring further prosecution in the interest of justice; defendants moved to dismiss also on the ground that to subject the defendants to a fifth trial would constitute cruel and unusual punishment. The motion was denied with leave to renew it at trial. The Court noted that, although the first six months of delay was due to governmental indecision, responsibility for the rest of the delay was not clearly assessable, both sides had acquiesced in repeated calendar postponements, defendants never moved for a speedy trial, and defendants showed no loss of witnesses or change in available evidence after the

reversal and remand for a new trial that would make the trial more difficult. The Court appeared to condition the right to effective renewal of the motion on a showing of loss of witnesses or of available evidence after remand. The test that will be applied, however, will not be so limited; it cannot be supposed that the mandate of the Court of Appeals was so much an unconditional and affirmative direction to conduct a new trial as it was a refusal to dismiss the indictment as an incident to reversing the judgment, leaving to the trial court the question of the propriety of a new trial in the circumstances shown to exist when the case was moved for trial. The Court of Appeals dealt with a record that closed with the verdict of April 24, 1964, and the sentences of June 19, 1964.

The principal contentions made on the motions revolve around the "surprize" calling of Joseph Valachi as a witness, the effect on the fairness of the trial of the large-scale publicity that followed, the admission through Valachi of prejudicial testimony picturing certain of the defendants as engaged deeply in hijacking and integrated in a Cosa Nostra "family," the allegedly fatal unfairness to the other defendants, by the rule of *United States* v. *Bruton*, 1968, 391 U.S. 123, that followed from Valachi's testimony against Albanese and Persico, and the unfair curtailment, by the rule of *Smith* v. *Illinois*, 1968, 390 U.S. 129, of the cross-examination of Vaccaro and Cancelli. Other points, less general in their application, are advanced by defendant Spero. In addition the grand and petit juries are challenged as having been improperly selected.

The points now made were all canvassed thoroughly during trial and in the extended oral argument of the present motions, and elaborate treatment of them at this time cannot be useful, so long as the decision being made is clear.

The Government had the right to call Valachi as a witness if satisfied that he had relevant and competent testimony to offer, and if confident that it was not suborning

perjury. If, as seems to be the case, it was the words of one of defense counsel spoken on January 6, 1964 (and not Valachi's senate sub-committee testimony), that first indicated to Government trial counsel that Valachi could testify to a Persico admission, then Government counsel were right to track the lead down. Having done so, through special agents, on October 11, 1967, their proper concern was to determine that what Valachi said was not a recent fabrication. No prior consistent statement was ever produced, and fabrication remained a lively suspicion to the end, given Valachi's background, his record and his determined negotiation of better living conditions as the price for his agreeing to testify.

At present there is no requirement that Government disclose its witnesses in advance of trial, although that is hardly a jewel in the crown of criminal justice, and it is inferentially condemned as less than fair by the statute that has long required the furnishing of a list of witnesses in capital cases. 18 U.S.C. § 3432; *cf. Gregory* v. *United States*, D.C. Cir. 1966, 369 F.2d 185, 187-189; Orfield, List of Witnesses and Jurors in Federal Criminal Cases, 1968, 44 F.R.D. 527. There is a general duty of fairness owed by all counsel when they make statements in open court in response to opposing counsel's requests. Government counsel spoke in open-ended terms of the witnesses that he might call, but he did not disclose that he might well call Valachi, and it is very difficult to see how even a suspicious adversary could have anticipated that Valachi would be called.*

Government counsel's belief—well or ill-founded—that disclosure might imperil Valachi's security, explains the non-disclosure adequately enough: the delay allowed to enable the defense to prepare to attack Valachi's testi-

*The statements in Persico's Point I on the present motion about the judge's knowledge of the intention to call Valachi are wrong in fact. The judge did not hear of Valachi until after the session of April 4.

monial competency and to cross-examine him redressed the surprise amply. The argument that disclosure would have resulted in a different composition of the jury has no measurable legal content and is rejected. The weightier point is that disclosure would have made it possible to select a jury willing to be sequestered throughout the trial or to take other measures. In retrospect, the Court would have been well-advised to act on its own initiative by recommencing the trial with a sequestered jury when, late on April 4, it was asked to sign a writ for Valachi's production. Non-disclosure to defense counsel precluded their moving for such relief. No action was taken, and, partly in consequence, the publicity reached the jury.

The publicity was certainly, by legal standards, prejudicial matter. No doubt many judges would unhesitatingly have declared a mistrial, and would now set aside the verdict. Much depends here on the nature of the issue tried, the atmosphere of the trial, the nature of the publicity, and its apparent effect on the jury. The issue, despite the many trials, was concise, single and simple. The court room atmosphere while the jury was present, was, on the whole, even and temperate throughout; substantially all of the sharp clashes between counsel occurred when the jury was absent. The publicity did not relate to guilt of the crime for which defendants were on trial, but it did picture certain of them as criminals and may be supposed by supplying unsworn assertions of criminal propensity, to have been relevant and prejudicial. (An unfortunate slip, in no way traceable to Government counsel, had disclosed to the jury that one defendant had been in prison with Vaccaro before the Akers hijacking.) The jury's reaction to the publicity, if reliance is placed on the interrogation of them, was, if somewhat guardedly disclosed, not such as to convey the impression that the jurors would not fairly try the concise issue before them.

There is no factual basis for the argument that the defendants were already notorious and hence inevitably ex-

posed to the sort of publicity that occurred in consequence of calling Valachi. That argument assumes that if the publicity is so damaging as to have jeopardized the fairness of the trial, it must nevertheless be tolerated if it is an inevitable concommittant of the public characters the defendants have created for themselves, and if it would be present in any trial of them at any place. Assuming the premise, the defendants bore no such public character. The jurors had never heard of them before trial.

The fairness issue must be decided within the four corners of the trial itself, and the impact of the publicity on the trial. On that basis it is concluded that the publicity did not destroy the fairness of the trial. No consideration has been given to the allocation of responsibility for the way in which the matter was handled on the day that Government counsel informed defense counsel that the next witness would be Valachi. Acting, as all participants were, under the confused pressures of the moment, it does not in retrospect appear that any participant acted in a way calculated to prevent, or to contain the effect of, the then anticipated publicity.

Counsel argue that not to set aside the verdict is "to place a confidence in the effect of curative instructions which is now constitutionally impermissible" under *United States* v. *Bruton*, 391 U.S. 123, 126-128, 137. But *Bruton* put its refusal to approve the constitutional adequacy of the limiting instructions there involved on the ground that such instructions are not an adequate substitute for the constitutional right to cross-examine one who has asserted that the defendant participated in the crime for which the confessing and accused men are standing trial together. The argument has no application to instructions the sole mission of which is to keep the focus of the jury's attention on the admissible evidence relevant to the issue of guilt. Such instructions are cognate to those given in every case in which prejudicial evidence is stricken and, more, in every case in which a defendant ex-convict testifies and is pro-

tected only by instructions on the limited effect to be given to his prior convictions. Indeed the instructions in such a case as the present one are easier to follow, and have a manifestly greater appeal to reason and fairness than instructions which permit the jury to consider prior convictions on the issue of credibility but not on the lurking issue of criminal propensity.

Valachi's testimony (Tr. 2759 *et seq.*, particularly Tr. 2780-2781, 2786-2793; 2951 *et seq.*; limiting instruction, Tr. 2948-2950) was that Albanese had told Valachi that he had participated in the Akers hijacking (Tr. 2786), and that by Albanese's own procurement; Albanese's wife had falsely testified at a 1961 trial (in order to discredit Vaccaro) that Vaccaro had made an indecent approach to her (Tr. 2788); he testified also that Persico in the presence of Albanese and McIntosh, implicitly stated that he had pulled the Akers hijacking for which he was then on trial (Tr. 2792). This directly relevant testimony came out embedded in a broader recital that made the Akers hijacking one in a series; Persico was described as complaining that, under protest, he had been paying a "tax" on all of them to Profaci; Persico ("Junior") was portrayed as seeking the advice of Valachi as an elder statesman about the propriety of Profaci's tax (Tr. 2791-2793). Valachi did not bring up the supposed Gallo-Profaci war, or the murderous violence it allegedly involved. It is useless again, to try to determine responsibility for the form the testimony took. All were aware of the shape it might take, and the courses pursued in this foreknowledge are plain on the record. There is great force in Government counsel's argument that in the immediate context of the present case the "other crime" and "criminal propensity" aspects of Valachi's recital were shorn of their usual objectionable nature because they accompanied directly relevant and dominatory evidence which if believed, rendered the remoter inference of probable guilt (from the reference to other crimes) meaningless and pointless. If Valachi was not believed on the directly

relevant points, again, on the argument, the "other crimes" material will necessarily have altogether lost its prejudicial efficacy as inducing an unwarranted belief in the defendants' guilt of the main offense. And, in addition, the case for the relevancy and admissibility of all that Valachi said is far from slight; similar crime evidence has a place in the law; Vaccaro's testimony was alive with implications of a course of hijackings, and the Albanese and Persico admissions of repetitious involvement tended to corroborate Vaccaro generally by offering a background explanation for what otherwise seemed an over-elaborate and over-regulated program for hijacking one Akers truck.

That Valachi's testimony was suspect, and manifestly so, appeared not only from its late appearance and the circumstances in which it became available, but from the very grave doubt that the substance of it could have been (as Valachi intimated, disclosed to Agent Flynn when Valachi first began to cooperate, and not have been recorded somewhere by Agent Flynn, or in some form transmitted through Agent Flynn to the United States Attorney (Tr. 2860, 2908, 2909, 2914-2915, 2964, 2965-2979, particularly 2977-2979). The countervailing factor relied on by Government counsel—that presumably informed defense counsel first alerted the Government trial counsel to the existence of a Persico admission in Valachi's memory—was not known to the jury. The Valachi testimony was violently attacked on all the available grounds; the value that the jury put on it is necessarily unknown.

Defendants claim that the principle of *Bruton v. United States* was transgressed by allowing Valachi to testify as to the Albanese and Persico admissions and by his testimony implicating the defendants in other hijackings. The point is particularly available to Sporo and McIntosh who were not accused by Valachi but who may have suffered by Valachi's broad-brush testimony implicating McIntosh certainly in an appearance (along with Albanese) of subordination to Persico in the Profaci "family," and who may

also have suffered (if Valachi was believed) by the corroboration of Vaccaro's testimony so far as it incriminated Persico and Albanese. Spero's counsel points out that *People* v. *Pilon*, 3rd Dept. 1968, 30 App. Div. 2d 365, applied *Bruton* broadly to require a reversal and severance essentially on the ground that limiting instructions do not protect a defendant against whose co-defendants much damaging evidence is admissible which does not reach the defendant seeking severance, particularly where the competency of evidence to corroborate certain accomplice evidence depended on the jury's first deciding that the alleged corroborating witness was not, rather, a second accomplice. No doubt much will flow from *Bruton* in the consideration of pre-trial motions for severance. But the Court in *Bruton*, 391 U.S. at 133-134 and footnote 10, 135 does not hold nor does it imply that joint trials are at an end wherever there is a confession; the point is not to infringe a non-confessing co-defendant's right of confronting his accuser, and in this case the admissions did not accuse co-defendants. Valachi's testimony, if believed, certainly showed Albanese and McIntosh acting as subordinates to Persico and treating Valachi as a competent adviser. That testimony was, however, directly descriptive of the observed acts of Albanese and McIntosh and Valachi could be fully cross-examined about what he saw and what obedience to Persico's command he observed; the testimony did not relay to the jury words of a non-testifying Persico that accused Albanese and McIntosh of complicity in the crime.

The *Bruton* point, at its strongest when made by Spero, had no validity when made by McIntosh and Albanese. If they are not taken to have admitted complicity by their silence—and that was ruled out, without exception, in the instructions (Tr. 2948-2950, 4510-4512)—they were not accused by Persico and had no need to cross-examine him.

It is argued, under *Smith* v. *Illinois*, 1968, 390 U.S. 129, that defendants were denied the right to cross-examine Vaccaro and Cancelli because neither witness was required

to state his residence or certain other background data. In each case the ruling was based on the conclusion that the witness was in fact in fear of reprisal, whether there was a foundation in fact for his fear or not. *Smith* v. *Illinois* did not present that situation, and Mr. Justice White, concurring, expressed his understanding of the Court's opinion as not inconsistent with his view that the rule of *Smith* v. *Illinois* does not warrant questions that merely harass, annoy or humiliate the witness, or justify inquiries which tend to endanger the personal safety of the witness. Here, the witnesses came forward with reasons for being excused from answering the questions. Moreover, Vaccaro was a witness for the fifth time and evidently known to the defendants. Capicelli was a witness for the second time and he was evidently known to defendant Spero. In the total circumstances *Smith* v. *Illinois* did not require answers to the background questions and the total circumstances indicate that the questions were not pressed in aid of effective cross-examination.

Much is made of the excusing of Juror No. 1 during trial, after hearing, and on a ground that would appear to be entirely proper. *United States* v. *Zambito*, 4th Cir. 1963, 315 F.2d 266, 269; *cf. United States* v. *Ellenbogen*, 2d Cir. 1966, 365 F.2d 982, 989; *United States* v. *Houlihan*, 2d Cir. 1964, 332 F.2d 8, 12-13; *United States* v. *Goldberg*, 3rd Cir. 1964, 330 F.2d 30, 42-43; *United States* v. *Gottfried*, 2d Cir. 1948, 165 F.2d 360, 365. The hearing produced no remotely credible suggestion of prejudice, and the extent and extravagance of the statements made went so far beyond the bounds of reasonable advocacy as to throw doubt on the extent to which reliance could be placed on counsel's elaborate arguments in other contexts. The excusing of the jurors and the substitution of alternates was without incident. Tr. 3988-3992.

The challenges to the selection of the grand and petit juries must fail on the facts. There can be no finding, on the evidence presented, of systematic exclusion of any de-

finable class, or systematic over-representation of any definable class, or of an evident departure from the standards of 28 U.S.C. § 1861. The testimony, rather, indicated a responsible and unbiased effort directed solely to choosing persons who could be expected to render the "efficient jury service" visualized by Section 1861. Paying attention to years of schooling, job stability, and job responsibility is not concentrating on irrelevant juror characteristics as a means of imparting an impermissible bias to the jury list (as in *Rabinowitz* v. *United States*, 5th Cir. 1966, 366 F.2d 34, *cf. United States* v. *Henderson*, 7th Cir. 1962, 298 F.2d 522), nor can it be shown to impart an income-level, racial, or geographic bias to the jury list, or a social-class bias.

Merging of the grand and petit jury lists, both originally drawn from the voter registration lists, resulted in the appearance of many persons in the panel who had served on grand juries once or repeatedly. That service did not disqualify them. However, since defense counsel appear rather generally to challenge grand jurors *qua* grand jurors, and the experience of working with the merged list was new to defense counsel, additional challenges were allowed for use against those who had grand jury service so as to leave the defendants free to use their base challenges against the others called into the box.

The cumulative effect of the trial, its difficulties, its interruptions and skirmishings is extremely difficult to assess for that overall fairness which, as the Court of Appeals has indicated, is peculiarly required in this case (305 F.2d at 536). It would be easy enough to say that while no one ground of objection is sufficient, the aggregate have a sufficient synergic effect to require setting the verdict aside. Yet it is very hard at the end to efface a sense that defense counsel often courted unfairness, and dilated on even slight episodes with every trope in the advocate's repertoire as a means of creating a cumulative impression that the trial was breaking down, that the scene was being inundated in unfairness. Yet recollection and consideration of what

went on before and with the jury does not bear that out. The publicity alone presents the genuine fairness issue so far as concerns matter not part of the trial evidence. Nevertheless, the elements of basic unfairness were present in the fearful terms on which Vaccaro's evidence was obtained, and in the unlovely bargaining with Valachi for his testimony. Courts are far too reluctant to face the implications of governmental use of the testimony of "cooperative" co-defendants and kindred testimony; it may reflect an unarticulated conviction that the entire fifth amendment, confrontation, burden-of-proof and presumption-of-innocence syndrome is so far displaced from the range of contemporary analyses of the sociological frame of reference of common crime and the role of "penology" that the constitutional imperatives of criminal procedure must be compensated for by these otherwise intolerable compromises. There is more than a disturbing doubt, too, that Gehring's possibly very important testimony about the location of the "straight job" on the critical morning was not fairly presented. (Tr. 3725, 3727, 3732-3733, 3734, 3735, 3755, 3756, 3757, 3775, 3781-3792). The Government's summation, powerful, well organized and presented with great force, needlessly transgressed allowable limits at several points [Tr. 4366, 4386 (failure of defendants to contradict Vaccaro's testimony), 4443-4446, 4468, 4470-4472]. Yet the dubious circumstances of the presentation of the Gehring evidence became in at least one sense immaterial since the prior trial testimony was in the end received as such on the ground that Gehring was, as to that part of his evidence, unavailable through collapse of recollection. The charge was generally acceptable to both sides and appeared to present the issues to the jury in a proper way (except, perhaps, as to Tr. 4515; see Tr. 4528-4530). The jury left with all the evidence and argument, had nothing of substance to marshal against the Government's elaborated evidence. The jury's task was to weigh that evidence for its probative force, and it was found sufficient. That result is unchallengeable purely as a matter of evaluating formally

sufficient evidence. The detail and circumstantiality of the Government's evidence have predictably turned out to require something more than attacks on credibility, no matter how forceful. The nature of the Government's proofs multiplied points of possible contradiction, yet nothing of substance was brought forward.

The final question, then, is whether even if the verdict may not be set aside on the basis of matters intrinsic to the trial and its immediate setting, the indictment must be dismissed in the light of the trial considered in its entirety on the grounds urged before Judge Weinstein and reserved by him for reconsideration at trial time. The specific circumstances of disadvantage which defendants advance as related to delay are not impressive. A dubiously useful witness called by Albanese at earlier trials died in December 1967, and it is said, although not very persuasively, that the death made it hopeless*—in the face of Valachi's new testimony—to press the defense that Vaccaro was motivated in his testimony by a wish to revenge himself on Albanese. Possible witnesses, disclosed in an FBI memorandum, to the time when the hijacked truck was first observed standing empty on the street had disappeared, but the memorandum itself was received in evidence. Gehring's failure of recollection between 1964 and 1968 impaired counsel's opportunity to cross-examine him in the most effective manner. The trial related to an episode that had occurred nearly nine years earlier. After four trials within the three year period May 1961 to April 1964, the fifth trial was not commenced until over four years after the last preceding trial commenced. Testimony, in such a setting is arguably a feat in recalling earlier testimony rather than the facts; consistency not truth arguably becomes the testimonial goal.

* Defense counsel argues that use of the dead man's testimony as given in a prior trial would be an inadequate means of matching the dead man's credibility against Valachi's *viva voce* testimony.

After remand, nothing occurred in the case for six months. After some desultory proceedings in January, on one date in March, and on three dates in April 1966, again nothing occurred until June 2, 1967. Starting in June 1967 a number of matters relating to bail and the assignment of counsel were dealt with and the case was put over until September 1967. Again in September 1967 matters relating to the assignment of counsel and to bail came up, the trial was twice postponed, and on October 9, 1967, it was marked ready and passed. On October 26, 1967, the first motion to dismiss was filed. The delay from that date until the trial commenced cannot be considered to any degree avoidable, given the fact that there were five separately represented defendants, all busy in the Courts, two of them new to the case, and two of them assigned counsel. The critical time lapses after affirmance were not justified and were not occasioned by acts of the defendants. Their result has been that a case in which the statute of limitations would have expired in 1964 was tried, and for the fifth time, nearly four years later, in 1968.

The salutary principle of *United States* v. *Tateo*, 1964, 377 U.S. 463, 466, that the governmental right of re-trial serves the interests of society and of defendants by assuring rigorous review of trials on defendants' appeals without putting the guilty beyond reach of conviction at a fair retrial if an earlier trial fails for a defect in the manner in which it is conducted, must acknowledge some outer limit dictated by due process fairness; so too, some due process limit must be recognized as hedging in the governmental right to suffer so long as it does not procure delay in criminal retrial (*cf. United States* v. *Ewell*, 1966, 383 U.S. 116); *Pollard* v. *United States*, 1957, 352 U.S. 354, does not establish an affirmative principle that the speedy trial requirement is not transgressed, in the absence of defense insistence on prompt retrial, unless it can be shown that there is governmental delay that is "purposeful or oppressive." The double jeopardy and speedy trial rights are

certainly limited by the societal interest in fair and workable law enforcement and prosecutorial procedures.

It is concluded that the history of the present case through the date of verdict in the fifth trial, including the merely marginal fairness of the fifth trial, reflects transgression of the due process limitations upon the governmental rights of retrial and orderly deliberateness in seeking retrial. *Cf. Ross v. United States*, D.C. Cir. 1965, 349 F.2d 210; *Hardy v. United States*, D.C. Cir. 1967, 381 F.2d 941, 948 fn. 35; *United States v. Parrott*, D.C.D. 1965, 248 F.Supp. 196. Note *Petition of Provoo*, D.Md. 1954, 17 F.R.D. 184, aff'd, 1955, 350 U.S. 857. It is not suggested that the subtraction of a single element of the whole history through the time of the rendition of the verdict would not require, or at least justify, a different result. It is held that the aggregate here has reached the point at which to enter judgments of conviction against the defendants would be to deny them due process.

On these grounds it is concluded that Counts 1 and 2 of the indictment must be dismissed by appropriate order as to the moving defendants.

Brooklyn, New York
October 11, 1968.

JOHN F. DOOLING, JR.
U.S.D.J.

Supreme Court, U.S.
FILED
SEP 9 1970
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Nos. 365 and 368

In the Supreme Court of the United States

OCTOBER TERM, 1970

HUGH MCINTOSH, PETITIONER

v.

UNITED STATES OF AMERICA

CARMINE PERSICO, JR., SALVATORE ALBANESE AND RALPH SPERO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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403-463—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

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HUGH MCINTOSH, PETITIONER

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UNITED STATES OF AMERICA

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. No. 365, App. 1a–19a) is reported at 425 F. 2d 1375. The opinions of the court of appeals on earlier appeals and in a mandamus proceeding are reported at 305 F. 2d 534, 349 F. 2d 6, and 406 F. 2d 192.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1970, and a petition for rehearing was denied on May 8, 1970. Mr. Justice Harlan extended the time for filing petitions for writs of certiorari to and including July 7, 1970, and on that date the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a fair trial by publicity following the appearance of government witness Joseph Valachi, and whether the publicity was attributable to governmental misconduct.

2. Whether testimony by Valachi concerning admissions made by certain petitioners violated the confrontation rights of other petitioners.

3. Whether the trial court properly ruled that a government witness who had testified at earlier trials need not disclose his address or place of employment where the trial court specifically found such information might endanger the personal safety of the witness.

4. Whether, in the circumstances of this case, following two reversals and two mistrials, petitioners properly could be tried a fifth time.

STATEMENT

On May 9, 1968, petitioners were convicted by a jury in the United States District Court for the Eastern District of New York of robbery and conspiring to rob a truck transporting goods in inter-

state commerce, in violation of 18 U.S.C. 1951. Petitioners Persico and McIntosh were sentenced to concurrent terms of fourteen and nine years' imprisonment respectively, with eligibility for parole to be determined by the Board of Parole. Petitioners Albanese and Spero received suspended sentences of ten years' imprisonment. The court of appeals affirmed. (Pet. No. 365, App. 1a–19a).

The procedural and factual background of this case is set forth in the opinion below (Pet. No. 365, App. A) and in the earlier opinions of the court of appeals. (See 305 F. 2d 534; 349 F. 2d 6; and 406 F. 2d 192; see also the government's brief in opposition in No. 1187, O.T. 1968, certiorari denied, 395 U.S. 911.)[1] In essence, the facts show that on July 28, 1959, a truck containing goods belonging to the Akers Motor Lines was hijacked. At the instant trial, as in the four previous trials, the government's principal witness was Casper Vaccaro, who testified that he conspired with the petitioners and others to hijack the truck. Vaccaro said that after he "spotted" the truck at the Akers terminal, he and certain of the petitioners

[1] Petitioners and others were indicted in April 1960. The first trial, held in May 1961, ended in a jury disagreement. The convictions resulting from the second trial, in June 1961, were reversed by the court of appeals due to trial errors. The third trial, held in May 1963, resulted in a mistrial as to petitioners Spero, Albanese, and Persico and in a hung jury as to the other defendants. The fourth trial, which lasted from January to April 1964, resulted in convictions of all of the defendants; these convictions were reversed by the court of appeals in July 1965 because of errors in the charge to the jury. The present trial took place in April and May 1968 (see Pet. No. 365, App. 2a–3a; *infra*, pp. 11–12.)

stopped the truck some distance from the terminal and held the driver, Edward Kennedy, until the other co-conspirators took the contents of the truck. Vaccaro also testified that petitioner Persico planned and directed the operation and that the other petitioners participated in the actual hijacking. (See the summary of Vaccaro's testimony in the first appeal at 305 F. 2d 534, 536.) The defense at the instant trial was an attempt to discredit Vaccaro by the testimony of an employee of Akers who testified that, due to the geographical location of the truck at the Akers yard at the time of the crime, it would have been impossible for Vaccaro to have "spotted" the truck (T. 4028–4045).

ARGUMENT

I. At the instant trial, the government for the first time used Joseph Valachi as a witness. Valachi, a federal prisoner, had previously achieved notoriety as a result of his testimony before a Senate committee in 1963 and elsewhere concerning organized crime. After the government announced that it would call Valachi as a witness, publicity concerning him and petitioners appeared in newspapers and other news media. The jurors were exposed to this publicity in varying degrees (see Pet. No. 365, App. 5a–8a). Petitioners contend that this publicity was the product of governmental misconduct in the "surprise" production of this witness after the trial had commenced

"T" refers to the transcript of the present trial; "ET" refers to proceedings in the fourth trial occurring on January 6, 1964; "ST" refers to post trial transcripts of September 1968; and "JT" refers to a post trial transcript of June 1969.

and that the impact of the publicity on the jury was not dispelled by the safeguards employed by the trial judge.

Valachi's name first entered the case at the fourth trial when the defense sought a continuance on the basis of testimony concerning organized crime given by Valachi before a Senate Committee. According to defense counsel, Valachi had testified (ET 21–23, 59) that petitioner Persico had told him at a detention center that "he had gotten $1,500 for his end of this very alleged hijacking, which is the subject of this indictment * * *."[3] In preparing for the fifth trial newly assigned government counsel, apparently prompted by this disclosure (see Pet. No. 365, App. 23a), confirmed the fact that Valachi had testimony to give regarding some of the petitioners (T. 2111, 2116–2118, 2122–2129).

On April 4, 1968, shortly after the instant trial commenced, the government sought and the trial judge granted a writ of habeas corpus ad testificandum for the production of Valachi (ST 3–8, 11–12). Valachi's life had been threatened in prison and the moving papers were sealed in view of the government's responsibility for Valachi's safety (T. 3561–3564; JH 13–18). Later, during trial, government counsel advised the defense out of the hearing of the jury that Valachi would be the next witness (T. 2094, 2111). When the defense objected to his appearance, the court required an offer of proof which informed defense counsel about the nature of the testimony ex-

[3] As a matter of fact, Valachi had not so testified (T. 2926, 2971–2972, 2998–2999).

pected from Valachi (T. 2097–2103, 2185, 2191–2193). That evening and the next morning the news media reported that Valachi was going to be a witness. As the opinion below details (Pet. No. 365, App. 5a–7a), the publicity, taken "at its worst," recited Valachi's criminal background and indicated that petitioners were connected to organized crime; that petitioner Persico was a "Cosa Nostra figure" (nicknamed the "Snake") and was a graduate of the "Profaci mob"; that Valachi, a "Cosa Nostra figure", had testified before a Senate rackets committee; that the case had been tried four times before; that a special prosecutor from the Department of Justice was trying the case; that the government was concerned for Valachi's safety; and that the admissions about which Valachi was to testify had been made to him while the petitioners were in prison.

The trial court closely examined each juror separately and each—except one who was later excused—assured the court that he could decide the case fairly based on the evidence introduced in the case (T. 2296–2407).[1] As the opinion below further details (Pet. No. 365, App. 9a), the judge further explicitly instructed each juror that the news mention of "Cosa Nostra" was a "smear" which was wholly irrelevant to the case and which petitioners could not and did not have to defend against; that the case was about one thing only: whether the petitioners or some of them obstructed by robbery goods in interstate commerce or conspired to do so, and nothing else. The court held the

[1] An illustration of such individualized *voir dire* is set out in the opinion below (see Pet. No. 365, App. 9a–11a, note 8).

ultimate disposition of the petitioners' motions for a mistrial in abeyance until after Valachi's testimony (T. 2423) and thereafter denied the motions (T. 3593–3607).

As this Court has recognized, resolution of the difficult problem of the impact of extra-judicial publicity upon a jury necessarily involves the exercise of a "large discretion" in the trial judge, and, in the last analysis, "each case must turn on its special facts." *Marshall* v. *United States*, 360 U.S. 310, 312; *Holt* v. *United States*, 218 U.S. 245, 251. This is, of course, not to say that the trial court's decision is final; clearly, however, it should be given substantial weight. In *Marshall*, the Court found that the court's discretion had been abused because the jury had been exposed to information previously characterized by the government as tending to refute the defense of entrapment and which the trial judge had ruled was so prejudicial that it could not be offered as evidence.

This case stands in a different posture. The publicity here, unlike that in *Marshall*, did not relate to the issue of guilt or innocence (Pet. No. 365, App. 8a). As the court below noted, most of the material contained in the publicity was brought out at trial "as competent evidence" *Ibid.*; see also Pet. No. 365, App. 10a. Here the trial judge made every conceivable effort to insure that petitioners were tried by a fair jury, and it was his judgment that the effect of the publicity would not, under all the circumstances, be unduly

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Save for the references to the "Cosa Nostra" and organized crime, which, as the court of appeals further pointed out, were "effectively" dealt with by the trial court (see Pet. No. 365, App. 9a).

prejudicial. He was in the best position to judge the matter and the circumstances reveal no reason why his judgment should be overturned. Nothing in *Sheppard* v. *Maxwell*, 384 U.S. 333, is to the contrary. In that case, there was a "carnival atmosphere at trial" which could have been avoided. Here, there is absolutely no suggestion that such an atmosphere existed.

Nor was the government guilty of misconduct because it called Valachi as a witness in the middle of the trial without prior notice to defense counsel. The background of this case was such that the government properly deemed secrecy essential to Valachi's safety. Following the second trial, a co-defendant had been shot to death and petitioner Persico himself had been shot and wounded during the third trial. In addition, Valachi's life had been threatened while he was in prison.[*]

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[*] The claim that reporters were aware of Valachi's presence before the government told defense counsel is, as the opinion below noted (Pet. No. 365, App. 5a, note 5), most "tenuous" (T. 2209-2210). With "a plenitude of reporters" present (T. 2209) the defense pressed for more than two hours in open court for most of the material used by the press (T. 2091-2213) and later testified to by Valachi.

The further claim that the government practiced deception on the trial judge in implying that the then United States Attorney had authorized the "secret summoning" of Valachi (Pet. No. 368, pp. 14, 18, 32) is far-fetched. The body of the affidavit made no such representation but indicated quite the contrary (S.T. 186); petitioners seek to sustain this argument on the sole, flimsy ground that the United States Attorney's typewritten initials appeared in the upper corner of the affidavit.

To be sure, with the benefit of hindsight, it might have been better practice had the jury been sequestered after Valachi was called. Neither government nor defense counsel, however, made any such suggestion along this line. In this ongoing trial, where decisions had to be made quickly, the failure to sequester hardly warrants a conclusion of governmental misconduct.

2. The claim that the admissions to which Valachi testified violated the rule of *Bruton* v. *United States*, 391 U.S. 123, is adequately answered in the opinion below (Pet. No. 365, App. 12a–14a). Valachi did not testify, as petitioners contend, that Albanese said he and his friends including Persico went out on hijackings together (see Pet. No. 365 at p. 17). Rather, he testified that Albanese said Persico was his friend and that "Chink" Vaccaro went with him on hijackings (T. 2781, 2786). Valachi further testified to a conversation with Persico in which the latter admitted paying money to Joe Profaci as "taxes" in the Akers hijacking and in which Persico admonished petitioners Albanese and McIntosh to listen to Valachi in the future and to seek his advice (T. 2792–2793). This testimony did not accuse the latter two petitioners of participation in the crime charged. Moreover, unlike *Bruton*, the statements here were not incriminatory admissions made to a third party outside the presence of the parties at trial without the right of confrontation; they were made in the presence of Albanese and McIntosh, and Valachi could be fully cross-examined as to how they acted. However that may be, the trial

court instructed the jury that complicity could not be inferred from their silence. In these circumstances, there is no reason to conclude that the jury could not have followed those instructions.[1]

3. Petitioners assert that the court's refusal to require the government witness, Vaccaro, to disclose his addresses and places of employment since his release from prison was error. In *Smith* v. *Illinois*, 390 U.S. 129, there had been no showing of any reason for excusing the witness from disclosing his name and address (see concurring opinion of Mr. Justice White, 390 U.S. at 133–134). Here, on the other hand, the court determined that Vaccaro's apprehension of danger was reasonable based on the history of violent events connected with the trial (Pet. No. 368, App. 16a). Considering further that Vaccaro had previously testified, been subject to cross-examination and was well known to the petitioners, the district court was justified in concluding that his address was not necessary to effective cross-examination. Cf. *United States* v.

[1] Contrary to petitioners' contention (Pet. No. 365, p. 15), jurors are not "powerless" to obey instructions to disregard prejudicial matters. Cf. *Frazier* v. *Cupp*, 394 U.S. 731, 735–736. Jurors are frequently admonished to consider prior convictions of a criminal defendant for the purpose of impeachment only and defendants whose criminal records are known to jurors are frequently acquitted. The strong admonition to the jury, including the court's statement that the references to organized crime in the publicity was a "smear" which the petitioners did not have to defend against, should have had an effect on conscientious jurors.

Lee, 413 F. 2d 910, 915 (C.A. 7), certiorari denied, 396 U.S. 1022; *United States* v. *Lawler*, 413 F. 2d 622, 627 (C.A. 7), certiorari denied, 396 U.S. 1046.

4. Petitioners complain that their final trial on these charges amounts to unconscionable government "oppresiveness." Petitioners' complaints about their repeated trials have previously been considered on a number of occasions, and we submit that it has been properly concluded that they have not been treated unfairly or subjected to undue prejudice.

In October 1967 (after reversal of the conviction resulting from the fourth trial), a motion was made to dismiss the indictment on the grounds that petitioners were denied the right to a speedy trial and

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[8] As earlier noted, the first trial of this case in May 1961 ended in a hung jury. A second trial the following month resulted in a conviction of all the petitioners and two other alleged co-conspirators La Fante and Magnasco. Magnasco was shot to death prior to sentencing. On appeal, the convictions were reversed in 1962 because of errors by the prosecutor and the trial judge. *United States* v. *Persico*, 305 F. 2d 534 (C.A. 2). The third trial, held in May 1963, ended in a mistrial as to Persico, Albanese and Spero when Persico was shot at and wounded. Petitioners McIntosh and defendant La Fante continued the trial, which ended in a hung jury. The fourth trial, which commenced in January 1964, resulted in a verdict of guilty in April 1964, but in July 1965 the court of appeals reversed and remanded for a new trial because of error in the charge to the jury. *United States* v. *Persico*, 349 F. 2d 6 (C.A. 2).

that they would be subjected to double jeopardy and denied due process by further retrial. After a hearing, Judge Weinstein entered an order on December 13, 1967, denying the motions. He determined that six months of the delay since the case was remanded for a new trial was chargeable to the government, and that the responsibility for the remainder of the delay was not clearly assessable (Pet. No. 368, App. H). The retrial commenced in April 1968 before Judge Dooling, who likewise denied the renewal motions to dismiss made before the retrial commenced and at the close of the case before the charge to the jury (Tr. 199, 4195). However, after the verdict came in, Judge Dooling distributed a proposed memorandum and order dismissing the indictment (Pet. No. 368, App. F, A44–A59). On December 2, 1968, before any final order was entered, the government filed a petition for a writ of mandamus in the court of appeals. On January 21, 1969, the court of appeals issued the writ and directed Judge Dooling to enter judgments of conviction on the jury's verdict and to sentence the defendants, 406 F. 2d 192, and this Court denied certiorari, 395 U.S. 911.[2]

[2] There is no substance to petitioners' argument (Pet. No. 368, pp. 35–37) that Judge Dooling's *proposed* order of dismissal was the equivalent of a postverdict directed verdict of acquittal and thus amounted to a disposition of the case unreviewable under *United States* v. *Sisson*, 399 U.S. 267. The short answer is that Judge Dooling did not in fact enter any order; thus there is no occasion to consider whether an appeal would have been available if he had. Moreover, the proposed order would not have relied upon the insufficiency of the evidence; but rather on other factors.

In *Harrison* v. *United States*, 392 U.S. 219, 221, note 4, this Court recently rejected a claim of a denial of a speedy trial when the petitioner had been indicted more than eight years earlier and had been tried and convicted three times. It reversed the judgment of conviction and remanded the case for a fourth trial. Thereafter, petitioner was again convicted and sentenced to life imprisonment and his conviction was affirmed on appeal. 419 F. 2d 691 (C.A.D.C.), certiorari denied, 394 U.S. 990. The fact that petitioners here bottom their claim on "cruelty and oppressiveness" rather than on speedy trial considerations does not serve to distinguish this case from *Harrison*. As the court below noted: "[I]t appears from the record that the defendants acquiesced in the repeated postponements", that "[t]here is no indication of 'purposeful or oppressive' delay on the part of the government", and that "the specific circumstances advanced by appellants as constituting prejudice resulting from delay are not impressive" (Pet. No. 368, App. A18–A19). See also *United States* v. *Ewell*, 383 U.S. 116, 120, 122.[10]

[10] The claim as to the sufficiency of the evidence in No. 368—raised for the first time in the petition for rehearing *en banc*—does not raise such exceptional considerations as to warrant review by this Court at this juncture. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2.

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writs of certiorari should be denied.

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